

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 01: 06-MC-00046 PTS

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

Case No. 2:03CV0294DAK (pending in the
District Court of Utah before Judge Dale A.
Kimball)

**PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF OTIS WILSON AND
REQUEST FOR EXPEDITED RESOLUTION TO DISCOVERY DISPUTE**

Plaintiff, The SCO Group, Inc. ("SCO"), pursuant to Local Rule 26(d) of the United States District Court for the Middle District of North Carolina, moves this Court for a telephone hearing to resolve a discovery dispute regarding the scheduling of the deposition of Otis Wilson. In support of this motion, SCO shows the following:

1. On May 30, 2006, this Court held a hearing on SCO's Motion to Enforce a Subpoena on Otis Wilson.
2. At the hearing, the Court issued its *ore tenus* Order granting SCO's motion and directed that Mr. Wilson appear for deposition in accordance with the subpoena.
3. On June 2, 2006, counsel for SCO contacted counsel for IBM and Mr. Wilson seeking "agreement at your earliest opportunity on a deposition date for Otis Wilson." Counsel for SCO further proposed that the deposition take place during the first week of July.
4. Five days later, on June 7, 2006, counsel for IBM and Mr. Wilson responded by e-mail, "I have a call into Otis and will let you know as soon as I hear from him what works."

5. Eight days later, having yet to receive a response from counsel for IBM and Mr. Wilson, counsel for SCO again contacted counsel for IBM and Mr. Wilson and suggested that the parties agree on July 6, 7, 11, or 13 for Mr. Wilson's deposition.

6. Counsel for IBM and Mr. Wilson rejected all those dates and proposed July 28 or August 4 – dates nearly two months after this Court directed that Mr. Wilson appear for deposition.

7. On June 16, 2006, SCO sent a Notice of Deposition for Mr. Wilson for July 11.

8. On July 3, 2006, Counsel for IBM and Mr. Wilson contacted counsel for SCO and stated that, due to conflicts in counsel's schedule and Mr. Wilson's schedule, Mr. Wilson would not appear for deposition on July 11.

9. Pursuant to Local Rule 26.1(c), the undersigned certifies that counsel for SCO and counsel for IBM and Mr. Wilson had various discussions and exchanged correspondence throughout the month of June in an attempt to resolve their differences. After diligent attempts to resolve their differences, the parties were unable to reach an accord. Having been unable to resolve the scheduling of Mr. Wilson's deposition pursuant to the January 2006 subpoena and this Court's May 30 and 31 Orders, SCO files this motion.

10. Counsel for SCO has apprised counsel for IBM and Mr. Wilson about this motion by both voicemail and e-mail, but has thus far been unable to obtain counsel's consent to have this matter heard by telephone. Nonetheless, in order to avoid further delay, counsel for SCO finds it necessary to file this motion at this time. Counsel for SCO will apprise the Court of any response from counsel for IBM and Mr. Wilson once a response is received.

WHEREFORE, SCO requests that given the timing at issue the Court conduct a telephone hearing on this Motion.

SCO further requests that the Court direct Mr. Wilson to appear for deposition on July 11, 2006, as required by the Notice of Deposition sent on June 16, 2006.

This the 6th day of July, 2006.

/s/ Robert R. Marcus

Robert R. Marcus
N.C. State Bar No. 20041
Heather H. Wright
N.C. State Bar No. 28874

OF COUNSEL:

SMITH MOORE LLP
P.O. Box 21927 (27420)
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401
Telephone: (336) 378-5200
Facsimile: (336) 378-5400

Robert Silver
Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Attorneys for The SCO Group, Inc.

CERTIFICATE OF SERVICE

This is to certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Michael T. Medford, Esq.
Manning, Fulton & Skinner, P.A.
Glenwood Plaza, Suite 500,
3605 Glenwood Avenue
P.O. Box 20389
Raleigh, North Carolina 27619-0389
Facsimile: (919)-787-8902

And I hereby certify that a true and correct copy of the foregoing was served on the following non CM/ECF participants by first-class United States mail, postage prepaid, addressed as follows:

David Marriott, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Facsimile: (212) 474-3700

Todd Shaughnessy, Esq.
Snell & Wilmer LLP
1200 Gateway Tower West
15 West South Temple
Salt Lake City, Utah 84101-1004
Facsimile: (801)-257-1800

This the 6th day of July, 2006.

/s/ Robert R. Marcus
Robert R. Marcus